# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1964

**No. 399**

UNITED STATES OF AMERICA,
*Petitioner,*

vs.

ARCHIE BROWN,
*Respondent.*

## BRIEF AMICI CURIAE ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA AND THE AMERICAN CIVIL LIBERTIES UNION

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### I.
### INTEREST OF AMICI

The American Civil Liberties Union and its Northern California affiliate file this brief pursuant to permission granted by the parties and filed with the Clerk of this Court. The Union has an enduring interest in guarding through legal action and other appropriate

means the guarantees of individual liberty set forth in the Constitution of the United States. The Union believes that the Act of Congress here in question, by narrowing the political and social liberties of the members of an admittedly lawful political association through a generalized finding of evil intent, is a dangerous threat to political freedom.

The statute seeks to partition off from a small minority the full guarantee of freedom of speech and association, the guarantee that liberty will not be taken without due process of law, and seeks to put members of the group under the sweep of a bill of attainder. The ACLU has never believed that the preservation of the liberties of the majority requires protection from the ideas and advocacy of those who would change our system of government. For these reasons, we joined many petitioners in asking this Court to find unconstitutional the oath requirement considered in *American Communications Association v. Douds*, 339 U.S. 382, and we now ask that the criminal penalty here in question be held void.

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## II.

### STATUTE INVOLVED

29 U.S.C. § 504. *Prohibition against certain persons holding office; violations and penalties.*

(a) No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his

conviction of, robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of subchapter III or IV of this chapter, or conspiracy to commit any such crimes, shall serve—

(1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization, or

(2) as a labor relations consultant to a person engaged in an industry or activity affecting commerce, or as an officer, director, agent, or employee (other than as an employee performing exclusively clerical or custodial duties) of any group or association of employers dealing with any labor organization,

during or for five years after the termination of his membership in the Communist Party, or for five years after such conviction or after the end of such imprisonment, unless prior to the end of such five-year period, in the case of a person so convicted or imprisoned, (A) his citizenship rights, having been revoked as a result of such conviction, have been fully restored, or (B) the Board of Parole of the United States Department of Justice determines that such person's service in any capacity referred to in clause (1) or (2) would not be contrary to the purposes of

this chapter. Prior to making any such determination the Board shall hold an administrative hearing and shall give notice of such proceeding by certified mail to the State, County, and Federal prosecuting officials in the jurisdiction or jurisdictions in which such person was convicted. The Board's determination in any such proceeding shall be final. No labor organization or officer thereof shall knowingly permit any person to assume or hold any office or paid position in violation of this subsection.

(b) Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(c) For the purposes of this section, any person shall be deemed to have been "convicted" and under the disability of "conviction" from the date of the judgment of the trial court or the date of the final sustaining of such judgment on appeal, whichever is the later event, regardless of whether such conviction occurred before or after September 14, 1959.

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## III.

### STATEMENT OF THE CASE

This case is the first application the provision of the Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 519) which forbids Communist Party members, and ex-Party members before the expiration of a five-year period, from serving as officers or, except in clerical or custodial positions, employees

of a "labor organization"[1] or group of employers dealing with a labor organization, or from serving as a labor relations consultant to a person engaged in an industry or activity "affecting commerce," 29 U.S.C. 504.

The record shows without dispute that the respondent, Archie Brown, has openly been a member of the Communist Party for many years. Nor is it disputed that Brown served as a member of the 35-man Executive Board of Local 10 of the International Longshoremen's and Warehousemen's Union and that these two statuses co-existed during the period mentioned in the indictment. It was just this co-existence which Congress sought to discourage by the now-repealed non-Communist affidavit provision of the Labor-Management Relations Act of 1947 (29 U.S.C. 159 [h]), and which Congress now seeks to punish by 29 U.S.C. 504. The legislative purpose of these laws, assuming that Section 504 may be considered as a replacement for Section 159(h), was found by this Court in *American Communications Association v. Douds,* 339 U.S. 382 (1950), to be protection against the danger that Communist Party members would be able to disrupt interstate commerce in times of emergency by precipitating or encouraging strikes for political reasons.[2]

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[1]The term is broadly defined by 29 U.S.C. 402(i) and (j).

[2]We submit that the government has overstated the case in suggesting in its opening brief (p. 8) that either Section 159(h) or Section 504 could "*eliminate* the danger of 'political strikes' by keeping from union leadership *the* class of persons who would be likely to engage in such disruptive activity . . ." (Emphasis added.)

Though respondent received a jury trial and did not admit or stipulate to the truth of the facts charged in the indictment, there were no disputed questions of fact for the jury to decide since respondent's individual attitudes were not in issue and neither was the question of his ability to abuse his power as a member of the Executive Board.[3] By a motion to dismiss (R. 3-5) and motion in arrest of judgment (R. 19) respondent raised the issue of the validity of the statute claiming, *inter alia,* that it was a bill of attainder, abridged his right to freedom of speech, press and association, and deprived him of due process of law. The motions were denied and respondent was convicted, but his conviction was reversed on appeal by the Court of Appeals for the Ninth Circuit *(Brown v. United States,* 334 F.2d 488). That court found the statute an "unreasonably broad" restraint on freedom of association and "so wholly lacking in notice of the constitutionally essential components of the crime that it cannot be judicially narrowed." Thus it held Section 504 void as in conflict with the First and Fifth Amendments.

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[3]Nor was the power of respondent's union to disrupt commerce in times of emergency made an issue. The proscription of the statute evidently applies just as forcefully to Local 10 of the Des Moines Harness Makers' Union as it does to the International Atomic Workers' Union, so long as both are "labor organizations" (see note 1, *supra*).

## IV.

### SECTION 504 IS NOT SAVED FROM UNCONSTITUTIONALITY BY AMERICAN COMMUNICATIONS ASSOCIATION v. DOUDS BECAUSE THAT CASE IS UNSOUND AND THIS COURT HAS NOT FOLLOWED ITS REASONING.

This case, should the statute be upheld, would go further than *American Communications Association v. Douds,* 339 U.S. 382. Discouraging unions from choosing officers with Communist affiliations is less drastic than prohibiting their election, as this Court has pointed out. *Aptheker v. Secretary of State,* 378 U.S. 500, 512-513, n. 11. Furthermore, the *Douds* reasoning proceeds from the express assumption that the persons affected "have the will and power" to call political strikes "without advocacy or persuasion . . ." 339 U.S. at 396. This assumption was basic to the *Douds* line of reasoning, since it was the basis for the Court's conclusion that the statute was aimed at force, not speech, which made the clear and present danger test inapplicable. Congress was moving against "substantial evils of conduct that are not the product of speech at all." *Ibid.* The statute we now deal with is not limited to persons who occupy positions of power; indeed respondent occupies no such position. If he desired a political strike he could not "call" one "without advocacy or persuasion" or at all. He could bring one about only by convincing other members of the Executive Board and, even then, the Board's action would be subject to review and rejection by the membership.

Nevertheless, since the government contends that *Douds* controls, we believe it appropriate to argue

that the *Douds* decision is unsound, that its authority has been greatly undermined, if not destroyed, by this Court's subsequent decisions, and that it should now be overruled.

There is, however, a more fundamental reason why *amici curiae* make this argument. *Douds* is not merely a precedent in the ordinary sense. It is the bedrock case which legitimated a pernicious process of reasoning. This process starts with an assertion about the characteristics, the propensities, the intentions of a group. Individuals are then made to suffer restrictions of their freedom, or other harm, which can be explained only on the theory that they *personally* have these characteristics, propensities, or intentions. Yet no proof of individual possession of these qualities is required. No refutation of it is ordinarily permitted. Membership alone is sufficient to bring the individual within the blanket condemnation of the stereotype.[4]

It is only on the basis of such thinking that it would be possible to conclude, either in the *Douds* case or in this one, that evidence that *some* communists have used union office to promote political

[4]Compare Macaulay's Essays (New York 1869) p. 668: "A man who should act, for one day, on the supposition that all the people about him were influenced by the religion which they profess, would find himself ruined before night; and no man ever does act on that supposition in any of the ordinary concerns of life, in borrowing, in lending, in buying, or in selling. But when any of our fellow creatures are to be oppressed, the case is different. Then we represent those motives, which we know to be so feeble for good, as omnipotent for evil. Then we lay to the charge of our victims all the vices and follies to which their doctrines, however remotely, seem to tend. We forget that the same weakness, the same laxity, the same disposition to prefer the present to the future, which make men worse than a good religion, make them better than a bad one."

strikes justifies barring *all* communists from *all* union offices or positions.

The *Douds* Court expressly stated that communists "carry on legitimate activities," 339 U.S. 382, 393. But it did not face the fact that this precludes holding an individual responsible for illegitimate activity on the mere showing of membership. The *Douds* opinion does not treat Communist Party members as individuals, each having his own characteristics and each entitled to be judged on his own merits and record. It treats them as fungibles. It is sufficient that Congress has come to conclusions about what "they" (i.e., communists generally) "have done and are likely to do again." *Id.* at 396.

Virtually every threatened or accomplished limitation of our constitutional liberties for the past 15 years has employed this process for its justification. It is likely to continue to haunt us (and not only in cases involving communists) until this Court grapples with the *Douds* case, not by limiting or qualifying or distinguishing it, but by recognizing and repudiating its basic fallacy.

The corrosive reasoning process which *Douds* legitimized is at the heart of 29 U.S.C. 504. It subjects respondent to penalties which can be justified only if he is a man whose propensity for indulging in political strikes, or his intention to do so, makes him a person whose officership in a labor union would be too dangerous to be tolerated. Without this, the conduct for which he is being prosecuted is not pertinent to any substantive evil which Congress has a right to

prevent or punish. Without this, there is no "substantial regulatory interest" which, even under the balancing test, could justify restricting respondent's freedom of association. *NAACP v. Button,* 371 U.S. 415, 444. Yet this indispensable premise had not been proved by any evidence addressed to respondent's personal qualities and record. Neither this premise, nor the blanket assertion from which it was derived, has been proved in any proceeding to which he was a party. Cf. *Noto v. United States,* 367 U.S. 290, 299; *Yates v. United States,* 354 U.S. 298, 330; *Renaud v. Abbott,* 116 U.S. 277, 288. Nor was respondent given the opportunity to rebut either assertion. Cf. *Mobile, J. & K.C. R. Co. v. Turnipseed,* 219 U.S. 35, 43.[5]

Fortunately, since 1950 the *Douds* principle that Communist Party members may be treated as fungibles has been departed from in case after case. Thus this Court has recognized that, assuming that some members of the Communist Party had illegal aims and engaged in illegal activities, "it cannot automatically be inferred that all members shared their evil purposes or participated in their unlawful conduct." *Schware v. Board of Bar Examiners,* 353 U.S. 232, 246. This is directly contrary to *Douds* and means that the evidence Congress heard about some communists engaging in political strikes could not ipso facto justify its conclusion that each and every communist is unfit for union office.

[5]Respondent's effort to introduce rebuttal evidence was rebuffed by the trial Court, *Brown v. United States,* 334 F.2d 488, footnote 4, and the statute does not appear to make this matter pertinent.

If specific intent to overthrow the government cannot be deemed proved by a showing of mere membership or holding of office in the Communist Party, *Yates v. United States,* 354 U.S. 298, 331, can intent to engage in political strikes be so proved? And can criminal punishment or a deprivation of constitutional rights be justified without proof of such specific intent?

In *Scales v. United States,* 367 U.S. 203, 224-225, due process was held to require that the relationship between the conduct or status punished and the activity justifying regulation "must be sufficiently substantial to satisfy the concept of personal guilt . . ." Clearly Section 504 does not meet that standard. *Scales* also recognized that a blanket prohibition of association with an organization having both legal and illegal aims would endanger legitimate expression and association and that the statute must not cut so deep as to punish the members for whom the organization is a vehicle for the advancement of legitimate aims and policies. *Id.* at 229-230. Neither under Section 504 nor in *Douds* was any effort made to encompass anything less than *all* members no matter what their aims or commitments.[6]

Finally, *Aptheker v. Secretary of State,* 378 U.S. 500, wove these strands together and demonstrated that any deprivation of a constitutional right turning on mere membership without requiring a further

[6] *Noto v. United States,* 367 U.S. 292, 299-300, warns against punishing a person "for his adherence to lawful and constitutionally protected purposes because of other and unprotected purposes which he does not necessarily share."

showing of "plainly relevant considerations such as the individual's knowledge, activity, commitment, and purposes" (*Id.*, 12 L.Ed. 2d at 1002) sweeps too broadly and cannot stand. Such a law necessarily violates the principle that regulations founded upon association must be drawn with precision so that they will not punish or deter constitutionally protected activities.

We are not impressed with the government's effort to distinguish *Aptheker* on the ground that there is a constitutional right to travel, but no constitutional right to be a union officer (Brief for the United States, pp. 20-21).

> "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . ." *Steele v. Louisville & Nashville RR Co.*, 323 U.S. 192, 202.

Is it possible that the right to participate in the councils of an organization which has been given quasi-governmental powers over one's work and livelihood is of less constitutional significance than the right to be a tourist? Whether or not there is any abstract right to be a union officer, constitutional protection must extend to one whose exclusion from union office by statute is based on unconstitutional standards. See *Wieman v. Updegraff*, 334 U.S. 183, 192.[7]

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[7]It may be noted that the dissenting justices in *Aptheker* took the view that exclusion from union office imposed "more onerous burdens" than exclusion from passport rights. 378 U.S. 500, 527.

Respondent stands before this Court asserting more than his own rights. We must also consider the rights of those members of Local 10 who elected respondent to represent them on the Executive Board, evidently with knowledge of his affiliations. The members of Local 10 have a First Amendment right to consult with each other and that right "necessarily includes the right to select a spokesman who could be expected to give the wisest counsel," *Brotherhood of RR Trainmen v. Virginia,* 377 U.S. 1; 12 L.Ed.2d 89, 93. True, the members of Local 10 are not parties to this proceeding. Respondent, however, is the "appropriate representative" since they voted for him, and their rights, if not taken into account in this proceeding, cannot be "effectively vindicated" at all. *NAACP v. Alabama,* 357 U.S. 449, 459.

The process of reasoning legitimated in *Douds* threatens the gravest dangers, not only to First Amendment freedoms, but to American standards of justice. This process has been implicitly repudiated in *Schware, Yates, Scales, Noto,* and now *Aptheker,* yet it continues to be very influential and is likely to remain so until *Douds* is overruled.

## V.

### SECTION 504 IS A BILL OF ATTAINDER BOTH ON ITS FACE AND AS APPLIED TO RESPONDENT IN THIS CASE

#### A. The Meaning and Background of Bill of Attainder

Clause 3 of Section 9 of Article I of the United States Constitution unqualifiedly forbids Congress to pass a bill of attainder in the following words:

> No bill of attainder or ex post facto law shall be passed.

Although attainder had the historical meaning of punishment by death, the landmark case of *Cummings v. Missouri*, 4 Wall. (71 U.S.) 277 indicated, at p. 323, that its use in the Constitution was broader:

> A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties.

Bills of attainder were in common use in Great Britian as a powerful and useful weapon against political dissenters from early days, and they remained is use in England throughout the 17th and early 18th centuries. See *Ex Parte Law*, 15 Fed. Cas. 3, No. 8126 (scholarly opinion by Erskine, J.); Cooley, *Constitutional Limitations* (8th Edition), 297, 547. It was not only the dread of attainders as used in England which made the drafters of the Constitution absolutely forbid their passage. Their pre-revolutionary use in the American colonies had made their provisions and

reach familiar. A famous example is the bill passed by the General Assembly of Virginia in 1676 inflicting punishment on the principal leaders of Bacon's rebellion against Governor Berkeley which included within the scope of the Act a large group of persons who were stated to have aided and abetted the plotters. See II Henning (Va.) *Statutes at Large* 373-374; II Story, *The Constitution,* 210-211. Other examples of American use of attainder will be found in *Annotation, What Constitutes Bill of Attainder Under the Federal Constitution,* 90 L.Ed. 1267, 1268-1270.

The first detailed discussion of the term "Bill of Attainder" in the Federal Courts came in the period immediately after the Civil War. During the reconstruction era, Congress and many of the state legislatures enacted statutes requiring, as a condition precedent to the exercise of certain political or civil privileges, the taking of an oath to the effect that an applicant had not participated in the "recent rebellion." In some of these statutes participation was defined so as to include, not only actual service in the Confederate armies, but also "sympathizing with" or "aiding" those forces.

Before the Supreme Court passed upon the constitutionality of this type of legislation, several challenges had arisen in the lower federal Courts. They tested the validity of a statute providing that no attorney could practice in the federal Courts without taking a test oath. In three cases, the act of congress imposing the test oath [12 Stat. 502 (1862) repealed, 23 Stat. 22 (1884)] was held unconstitutional.

*In re Shorter,* 22 Fed. Cas. 16, No. 12811 (D.C. Ala. 1865); ***Ex Parte Law,*** 15 Fed. Cas. 3, No. 8126 (D.C. Ga. 1866); *In re Baxter,* 2 Fed. Cas. 1043, No. 1118 (D.C. Tenn. 1866). The *Shorter* and *Law* cases held the oath to be void as enacting a bill of attainder; the *Baxter* case held the oath void as, inter alia, an ex post facto law and requiring self-incrimination.

In 1867 the Supreme Court in twin cases passed upon the constitutionality of the previously cited federal attorney's test oath statute, *Ex Parte Garland,* 4 Wall. (71 U.S.) 333 and on the constitutionality of the test oath clause of the Missouri Constitution. *Cummings v. Missouri,* 4 Wall. (71 U.S.) 277. *Cummings v. Missouri* was an appeal from a criminal conviction of a priest who declined to take the test oath required by the Missouri Constitution as a prerequisite to functioning in the State as attorney, teacher, clergyman, corporate official, or in various other capacities. The oath required individuals to swear that they had never engaged in any past conduct hostile to the United States, or expressed any disloyal sentiments, or aided or abetted enemies of the United States.

The State of Missouri argued in *Cummings* that this requirement did not constitute a bill of attainder since it did not inflict any punishment. In support of this contention it was urged that "to punish one is to deprive him of life, liberty, or property, and to take from him anything less than this did not punish him at all . . ." (4 Wall. at 320). This contention was

effectively refuted by the Court in an opinion pointing out that any deprivation of rights freely available to others constituted a punishment. The Court's opinion reads in part:

> The learned counsel does not use these terms—life, liberty, and property—as comprehending every right known to the law. He does not include under liberty freedom from outrage of the feelings as well as restraints on the person. He does not include under property those estates which one may acquire in professions, though they are often the sources of the highest emoluments and honors. *The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. Disqualification from office may be punishment,* as in cases of conviction upon impeachment. Disqualification from pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment. (Emphasis supplied.)
>
> * * *
>
> The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions are alike open to everyone, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined. (*Id.* at pp. 321-322).

In the *Garland* case the Court was required to pass on the constitutionality of the previously cited statute excluding from practice in the federal Courts attorneys who had not taken an oath as to their past loyalty to the United States. The Court held that the statute was unconstitutional as a bill of attainder, pointing out that deprivation of the liberty of practicing before the federal Courts could be "regarded in no other light than as punishment***" (4 Wall. at 377).

*Lovett v. United States*, 328 U.S. 303, is the most recent application of the bill of attainder prohibition. Section 304 of the Emergency Appropriations Act of 1943 (57 Stat. 431, 450) provided that none of the funds therein appropriated could be used to pay salaries to three named individuals. As the Court stated, the purpose of Section 304 was:

> ***To "purge" the then existing and all future lists of government employees of those whom congress deemed guilty of "subversive activities" and therefore "unfit" to hold a federal job. 328 U.S. 303, 314.

It was argued that Section 304 was not a bill of attainder since it was merely a means of effectuating Congress' power to determine the conditions of employment in the federal government and that denial of such employment did not constitute a "punishment."

The holding of the *Lovett* Court was that determination of "unfitness" to hold federal office by legislative finding of political subversion constituted

punishment without a judicial trial. The Court stated at 328 U.S. 303, 315, 316:

> . . . Legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the constitution. *** Section 304 was designed to apply to particular individuals. Just as the statute in the two cases mentioned [*Cummings* and *Garland*] it "operates as a legislative decree of perpetual exclusion" from a chosen vocation. This permanent proscription from any opportunity to serve the government is punishment, and of a most severe type.

**B. Section 504 Is a Bill of Attainder on Its Face and as Applied in This Case**

We think that there can be little doubt that one who reads 29 U.S.C. Sec. 504 in the light of the historical background described above must conclude that Congress has enacted a bill of attainder. The statute provides criminal penalties for persons who are Communist Party members or have been members during the past five years and who hold office or employment in unions or certain facets of management. It is true that one can avoid the penal sanction, but only at the cost of undergoing another punishment, the loss of employment or position in union or certain management affairs. This punishment is meted out by the legislative branch for past conduct, to wit: lawful political affiliation and nothing more.

Just as the priest in *Cummings v. Missouri* could have avoided criminal liability by not preaching, respondent could have avoided criminal liability by resigning from his elected position. Just as Congress was only punishing a suspected proclivity for future misconduct in government service in *United States v. Lovett,* Congress is only punishing a suspected proclivity for political strikes in interstate commerce in the instant case. Just as the attorney in *Ex Parte Garland* could not expunge his activities during the Civil War, respondent could not expunge the fact that he had been a member of the Communist Party during the five years preceding the enactment of Section 504. In those three cases, as in the instant case, there was a legislative finding as to ascertainable members of a group so as to inflict punishment without a judicial trial.

The Brief of the United States (at page 11, footnote 2) asks this Court to give no consideration to the portion of Section 504 forbidding a person who "has been" a member of the Communist Party during the previous five years from holding union or management office or employment. The government assumes that this is a severable provision. We doubt that this is so. Without the five year "cooling off" period, Congress might never have passed the legislation because of the fear of pro forma resignations from the Communist Party. See Brief for the United States at pp. 32-33 and especially the cases cited in footnote 7.

It is also not the burden of respondent to guess as to whether the Courts will or will not hold a certain portion of a legislative enactment to be severable and invalid. On the face of this statute respondent was disqualified from union office and it would not have changed his position to have resigned his Communist Party membership. Thus respondent had no choice between union office and Party membership, even if such an election could constitutionally be forced upon him.

But even if the portions of Section 504 which make it an obvious bill of attainder may be excised, its application in this case is still within the prohibition. It is helpful to look on the bill of attainder prohibition as an aspect of the most basic concept of our constitutional government, the separation of powers. Congress may prescribe and proscribe conduct, but the judiciary, and only the judiciary, may adjudicate guilt. In this case, respondent's trial did not take place in the Court below but on the floor of Congress. The legislative branch has the power to prohibit persons loyal to another government from serving as union officers, and it has the power to prohibit persons who advocate or conspire to advocate political strikes from serving as union officers; but when Congress makes it indisputable that each and every member of the Communist Party will disloyally advocate political strikes and thus may not be union officers, that is a legislative finding of guilt. That is the punishment; that is the attaint without trial, without judicially screened evidence.

This Court said in *United States v. Lovett*, 328 U.S. 303, 316:

> No one would think that Congress could have passed a valid law, stating that after investigation it had found Lovett, Dodd and Watson "guilty" of the crime of engaging in "subversive activities" defined that term for the first time, and sentenced them to perpetual exclusion from any government employment.

Yet if one substitutes "Communist Party" for the names mentioned in the above quotation and "political strikes" for "subversive activities" we have the exact situation of the instant case where respondent has been found "guilty" of a proclivity to engage in political strikes, without having had an opportunity to present a defense to the charge, and has been sentenced to exclusion from labor union (and management) employment and office.[8] If this kind of guilt without judicial trial can be applied to one unpopular and hated group, then any unpopular minority group may likewise be stigmatized to its detriment. Compare *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123.

It was argued in the Court below that the prohibition of Section 504 is not "punishment" but "regulation" with a few side effects. This argument was buttressed by discussing those cases, such as *Trop v. Dulles*, 356 U.S. 86, and *Flemming v. Nestor*, 363

[8] The government's power over employment in labor unions should certainly not be any greater than its power over its own employees.

U.S. 603 which deal with the question, what is a penal statute? But we are not dealing here with side effects. Congress intended to punish those who violated Sec. 504. A statute providing for a year in prison could not be non-penal any more than a statute punishing bank robbers is non-penal because its legislative purpose was to provide security for depositors' funds.

The case of *De Veau v. Braisted*, 363 U.S. 144, was also discussed in the briefs below as providing a basis for the validity of the statute here involved. That case sustained the validity of a state statute forbidding persons who had been convicted of certain felonies from serving as union officers on the New York waterfront. However, the opinion of the Court was expressly premised on the fact that there had already been a judicial finding on the individual guilt of each person so restricted. The opinion stated at page 160:

> The distinguishing feature of a bill of attainder is the substitution of a legislative for a judicial determination of guilt. See *United States v. Lovett*, 328 U.S. 303, 90 L.Ed. 1252, 66 S.Ct. 1073. Clearly, Section 8 embodies no further implications of appellant's guilt than are contained in his 1920 judicial conviction; and so it manifestly is not a bill of attainder.

It need not be emphasized that respondent in this case has never been found guilty of having a specific intent or desire to engage in political strikes.

We urge the Court to reassert the vitality of the bill of attainder prohibition and to condemn this statute as an exercise of that forbidden power.

## VI.

### CONCLUSION

If Section 504 is constitutional it would only be consistent to hold that Communist Party members can be punished for speaking at union meetings for fear that they will incite political strikes. Amici do not believe we have reached the point where a troublesome person or group may be "regulated" out of existence because a legislative body indisputably "finds" that his affiliations pose potential dangers to interests which that body has the duty to protect.

Amici also urge that Section 504 be condemned as a bill of attainder and an attempt by the legislative body to perform a judicial function without the safeguards of due process of law.

Dated, San Francisco, California,
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